Supreme Court, U.S.
FILED
AUG 25 1984
ALEXANDER L. STEVAS
CLERK

CORRECTED COPY

No. 84-302

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TERENCE J. ANDERSON

c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Counsel of record for the Honorable Alcee L. Hastings Petitioner.

AUGUST 24, 1984

Corrected petition filed September 24, 1984

QUESTIONS PRESENTED

1. Whether a district judge has inherent authority to order that the entire record of a federal grand jury investigation be disclosed, without any prior examination by the court to a petitioner who has shown only that it is re-investigating the charges on which the objecting respondent was indicted, publicly tried, and acquitted and who seeks the materials for use in administrative proceedings that cannot be reviewed by any court?

2. Whether the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act") should be construed to facilitate the Justice Department's use of the grand jury's powers to assist the judicial councils in determining whether federal judges should be administratively sanctioned or impeached for their conduct in office?

3. Whether a construction of the Act that permits a special committee to examine the records of a grand jury investigation for the sole purpose of enabling the Judiciary to determine and advise the House of Representatives whether it believes a federal judge should be impeached and reprosecuted before the Senate on charges that he committed a high crime for which he has already been publicly tried and acquitted is consistent with the Constitution's allocation of powers among the three branches of government, the Act's express provisions, or the purposes for which those provisions were adopted?*

---

*Judge Hastings has filed a separate action challenging the constitutionality of the Act and of the manner in which it is being applied in the administrative proceedings against him. Hastings v. Judicial Conference of the United States, et al, No. 83-3850 (D.D.C. July 25, 1984), (appeal noted, August 23, 1984). The issues raised by that challenge will be presented to this Court in due course.

4. Whether the court of appeals erred in holding that, under the Act, a district court is a forum in which a petitioning special committee may properly seek access to grand jury materials, but is not a forum in which a respondent federal judge may present evidence in opposition to the petition and require that the judicial power be exercised independently and impartially to determine whether disclosure is necessary or proper?

PARTIES TO THE PROCEEDINGS

The members of the respondent Investigating Committee of the Judicial Council of the Eleventh Circuit are Chief Judge John C. Godbold, Circuit Judges Gerald B. Tjoflat and Frank M. Johnson, Jr., and District Judges Sam C. Pointer and William

---

*(Continued)
In the courts below Judge Hastings urged only that the Committee's petition should be denied in order to minimize or avoid certain of the constitutional problems that the Act presented.

C. O'Kelley. William Borders, Jr., was identified as an interested party in the courts below, but he did not respond or otherwise appear in either court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	iii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTIONAL STATEMENT	2
STATUTES AND RULES INVOLVED	3
STATEMENT OF THE CASE	4
1. Nature of the Action	4
2. Statement of Facts	7
3. Proceedings in the Courts Below	10
REASONS FOR GRANTING THE WRIT	20
1. The Court Should Grant Review to Determine Whether the Lower Court's Unprecedented Departure from Established Principles Developed to Protect the Integrity of the Grand Jury Was Justified	25
2. The Court Should Grant Review to Determine Whether the Court of Appeals Properly Construed the Act to Avoid or Minimize the Conflict Between the Statutorily and Constitutionally Prescribed Allocation of Powers	33

Page

3. The Court Should Grant Review to Assure that the Issues Presented are Resolved Uniformly and By the Only Court Whose Members' Interest Will Not Be Directly Affected by the Outcome 40

Conclusion 44

TABLE OF AUTHORITIES

Page Cited

Statutory and Rule Provisions

Judicial Council Reforms and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372 (c), 604 (1982) . . . . . passim

28 U.S.C. § 372(c) (1982) . . 11,14, 34,35

28 U.S.C. § 1254(1) (1982) . . 3

28 U.S.C. § 1291 (1982) . . . 3

Rule 6(e), Federal Rules of Criminal Procedure 3,27, 29,44

Judicial Decisions

Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) 41

Judicial Decisions (Cont'd.)

	Page Cited
Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948)	38
Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979)	26,30
DuPlantier v. United States, 606 F.2d. 654 (5th. Cir. 1979), cert. denied, 449 U.S. 1076 (1981)	41
Hastings v. Judicial Conference of the United States, et al., No. 83-3850 (D.D.C. July 25, 1984) (appeal noted, August 23, 1984) . .	ii,39
Hayburn's Case, 2 U.S. (2 Dal.) 408 (1792)	38
Illinois v. Abbott & Associates, Inc., 103 S. Ct. 1356 (1983)	26,29
Nixon v. Administrator of General Services 433 U.S. 425 (1977)	38
Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)	38
Petition to Inspect and Copy Grand Jury Materials, In re, 576 F. Supp. 1275 (S.D. Fla. 1983)	2

Judicial Decisions (Cont'd.)

	Page Cited
Petition to Inspect and Copy Grand Jury Materials (Hastings), In re, 735 F.2d 1261 (11th Cir. 1984)	2
United States v. Baggot, 103 S.Ct. 3164 (1983)	27,29
United States v. Borders, 693 F.2d 1318 (11th Cir. 1982) cert. denied, 103 S.Ct. 1875 (1983)	8
United States v. Ferreira, 54 U.S. (13 How.) 39, (1851) . .	38
United States v. Proctor & Gamble Co., 356 U.S. 677 (1958)	25
United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981), vacated, 736 F.2d 1432 (11th Cir. 1984)	7
United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983)	27,29
United States v. Will, 449 U.S. 200 (1980)	40

Other Authorities

H. R. Rep. No. 1313, 96th Cong., 2d Sess. (1980)	34
Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671 (1980)	38

Other Authorities (Cont'd.)

	Page Cited
S. Rep. No. 362, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News 4315 . .	34

No. 84-302

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE HONORABLE ALCEE L. HASTINGS,
Petitioner,

v.

INVESTIGATING COMMITTEE OF THE JUDICIAL COUNCIL OF THE ELEVENTH CIRCUIT

and

THE UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

United States District Judge Alcee L. Hastings petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit tc review the decision of that court in In re Petition to Inspect and Copy Grand Jury Materials (Hastings), No. 84-5003.

OPINIONS BELOW

The district court's memorandum opinion and order are reported, In re Petition to Inspect and Copy Grand Jury Materials, 576 F. Supp. 1275 (S.D. Fla. 1983), and are reproduced in the separate appendix filed with this petition, App. 59-105. The court of appeals's original decision is reported in the temporary edition of the Federal Reporter, In re Petition to Inspect and Copy Grand Jury Materials (Hastings), 735 F.2d (No. 2) 1261 (11th Cir. 1984), and is reproduced in the separate appendix, App. 1-58. The court amended its opinion in an order denying a petition for rehearing, App. 106-07. The amended opinion is not yet reported.

JURISDICTIONAL STATEMENT

The petition asks this Court to review a decision that the United States

Court of Appeals for the Eleventh Circuit entered on June 20, 1984. On August 3, 1984, that court entered an order denying Judge Hastings's petition for rehearing (App. 106-107), and on August 13, it entered a further order staying its mandate until August 27, 1984, to permit the filing of this petition. This petition was filed on August 25, 1984. The court of appeals had jurisdiction under 28 U.S.C. § 1291 (1982). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTE AND RULE INVOLVED

This case involves the provisions of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604 (1982), and of Rule 6(e) of the Federal Rules of Criminal Procedure.

Because of their length, they have been reproduced in the separate appendix, App. 117-146.

STATEMENT OF THE CASE

1. The Nature of the Action

Petitioner is a United States district judge. His conduct was investigated by a federal grand jury. The grand jury returned an indictment charging that petitioner had conspired to corrupt and obstruct justice. Petitioner was tried and acquitted. Shortly thereafter, two members of the judicial council of the circuit in which petitioner serves filed a complaint under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("the Act"), Pub. L. No. 96-458, 94 Stat. 2035 (1980), codified at 28 U.S.C. §§ 331, 332, 372(c), 604 (1982). The complaint realleged the charges on which petitioner had been acquitted and

asked the judicial council to re-investigate the charges and recommend that petitioner be impeached by the House of Representatives.

The respondent committee was appointed to investigate the allegations in the complaint. As one of the first steps in its investigation, the committee filed a petition asking the district court to permit the committee's representatives to inspect and copy all records of the grand jury that had indicted petitioner. The Justice Department supported the petition; petitioner here opposed it. The other judges serving in petitioner's district disqualified themselves, and a judge from outside the circuit was designated to preside.

The district court concluded that the Act overrode the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure

and the standards that this Court had articulated to restrict the disclosure of grand jury materials. The designated judge determined that it would be inappropriate for the court to examine the materials to determine which were relevant to the committee's investigation or to resolve the factual issues raised by Judge Hastings's affirmative defenses. The court ruled that such an exercise of the judicial power by the court might "usurp the investigatory function Congress has placed within the exclusive province of the Special Committee." App. 87-89; cf. 49 n.9. The district court entered an order granting the committee's representatives full access. After hearing the appeal, a panel of specially designated judges affirmed the district court's order.

2. Statement of Facts

Attorneys from the Public Integrity Section of the Justice Department's Criminal Division used Grand Jury 81-1 in the Southern District of Florida to investigate Judge Hastings's conduct. On December 29, 1981, the Grand Jury returned and the attorneys for the government filed an indictment formally charging that Judge Hastings and William Borders, Jr., had conspired to corrupt and obstruct justice. The prosecuting attorneys represented to the trial court that the charges against Judge Hastings related solely to his official acts in United States v. Romano, 523 F. Supp. 1209 (S.D. Fla. 1981).

The government presented the evidence relevant to the charges against Judge Hastings in two separate trials. Mr. Borders was tried first. Judge Hastings

was not present or represented at that trial. Neither he nor Mr. Borders testified. Mr. Borders was convicted, and the court of appeals affirmed that conviction, United States v. Borders, 693 F.2d 1318 (11th Cir. 1982). Judge Hastings's trial began on January 19, 1983, and lasted until February 4, 1983. Judge Hastings took the stand, testified, and was fully cross-examined. The jury found him not guilty, and he was acquitted.

On March 17, 1983, two members of the Judicial Council of the Eleventh Circuit ("the Council") filed a complaint with the Clerk of the United States Court of Appeals for the Eleventh Circuit. Relying on that court's opinion in United States v. Borders, they realleged the facts and allegations upon which Judge Hastings had

been indicted, tried, and acquitted.[1] They asked that such investigations be conducted and orders entered "as shall be necessary to vindicate the Honor of United States Judges and to discipline [Judge Hastings] for his odious behavior including . . . the making of a recommendation to the House of Representatives that [he] be impeached. . . ."[2]

On March 29, 1983, the chief judge of the Eleventh Circuit entered an order appointing himself and four other judges to a special committee (the "Committee") to investigate the facts and allegations

---

1. Relying upon newspaper stories published in connection with Judge Hastings's trial, they also alleged that the manner in which Judge Hastings had conducted his defense and his own testimony at trial showed that he had violated the Code of Judicial Conduct.

2. Complaint at 8, In re Alcee L. Hastings (11th Cir. Jud. Council), reproduced as part of the record below, Appendix to Judge Hastings's Answer and Affirmative Defenses at 6-14, In re Petition to Inspect and Copy Grand Jury Materials, 576 F.Supp. 1275 (S.D. Fla. 1983).

in the complaint (cf. App. 57-58). On June 3, 1983, the Committee filed the petition that initiated the proceedings below. App. 110-16.

3. Proceedings in the Courts Below

The Committee's petition alleged that a complaint had been filed against Judge Hastings, that the Committee had been appointed to investigate the facts and allegations contained in that complaint, and that the Committee had determined that "it must examine the record, transcript, minutes and exhibits of the proceedings of the grand jury that indicted Judge Hastings and Mr. Borders." App. 111-13. The Committee acknowledged that its petition did not satisfy the requirements of Rule 6(e) of the Federal Rules of Criminal Procedure, but asked that the district court exercise inherent authority to order disclosure without any further

inquiry into the Committee's need for those materials.

Throughout, the Committee argued that the Act's provision authorizing each special committee to "conduct an investigation as extensive as it considers necessary" [Act, § 3(a); 28 U.S.C. § 372(c)(5) (1982)] coupled with an overriding need to maintain the integrity of the judicial branch required that the Committee be granted access to all available materials that might bear upon Judge Hastings's conduct in office. The Committee urged that the importance of the Act's underlying purposes supported a determination that that statutory provision overrode the limitations imposed by Rule 6(e) and justified a departure from the traditional "particularized need" standard as it had been articulated and applied by this Court.

The Justice Department urged that the Committee's petition be granted. The attorneys who had prosecuted both criminal cases advised the district court that, "as the sole party privy to the grand jury materials, the Government represents that they contain information relevant to the Committee's investigation, which the Committee does not have readily available to it."[3] They urged that blanket disclosure of grand jury materials was necessary because "criminal proceedings may not always be a viable way of dealing with alleged acts of misconduct by sitting federal judges, thus emphasizing the interest in insuring that the Investigating Committee [sic] have all available information for use in performing its functions under 28 U.S.C. § 372(c)."[4]

---

3. Government Response to Petition to Inspect and Copy Grand Jury Materials at 5-6, In re Petition (S.D. Fla.), supra.

4. Id. at 6.

They amplified the Department's position before the court of appeals. They confirmed that the Department had assumed responsibility "for investigating . . . allegations of criminal misconduct by, and involving, federal judges" and reported that "[i]n a small number of cases in which an indictment has not been returned, there has been evidence developed before a grand jury that reflects possible misconduct by a sitting judge . . . [and that] is not generally known outside the Grand Jury."[5] On this basis, they urged that the Act should be construed to provide the Justice Department with a mechanism by which it "may disclose to a Judicial Council possible evidence of misconduct that was

---

5. Brief for Appellee United States of America at 16-17, In re Petition to Inspect and Copy Grand Jury Materials (Hastings), 735 F.2d 1261 (11th Cir. 1984).

developed exclusively before a grand jury."[6]

Judge Hastings appeared and asked the district court to dismiss or deny the Committee's petition. He contended that the Act's express prohibitions against any public disclosure during the administrative proceedings and against any construction that would affect the Federal Rules of Criminal Procedure [Act, § 3(a); 28 U.S.C. § 372(c)(14) and (c)(16)(1982)] should be construed to prohibit judicial proceedings of the kind initiated by the petition. He argued that Congress's declared intent to preserve the exclusivity of the House's impeachment prerogatives combined with the doctrine of constitutional avoidance to preclude a construction of the Act under which agencies of the judicial branch would

---

6. Id. at 17.

assume the role of legislative commissioners responsible for re-investigating charges that an acquitted judge had committed a high crime in office. Moreover, he argued that the Justice Department's position made it clear that the potential for misuse of the grand jury's powers that had recently concerned this Court was present in concrete form in this case.

In the alternative, Judge Hastings contended that he was entitled to have the court grant him the same protections granted other former targets of grand jury investigations. At a minimum, he urged that any disclosure must be limited to materials that the court independently determined were relevant to the facts and allegations of the complaint and were not available to the Committee from the trial records or other readily accessible

sources. In addition, he pled and claimed he was entitled to an opportunity to prove facts supporting two affirmative defenses. First, he alleged the petition was an act in furtherance of a constitutionally impermissible conspiracy to deprive him of rights he held incident to the judicial office and was motivated by an intent to retaliate against him for the manner in which he had conducted his defense in the criminal proceedings. Second, he alleged that the facts that had leaked to the press prior to the filing of the petition made it likely that disclosure of the grand jury materials to the Committee would result in further improper leakage and use of those materials.

After the judges of the Southern District of Florida recused themselves, the Chief Justice designated the Honorable Eugene A. Gordon of the Middle District of

North Carolina to hear and decide the case. Judge Gordon heard oral argument and considered the pleadings and legal memoranda submitted by the parties, but declined to examine the grand jury materials himself or to hear any evidence in support of or in opposition to the petition.

On December 20, 1983, Judge Gordon granted the petition (App. 99-105). In an accompanying memorandum opinion, Judge Gordon concluded that the Committee's investigation was not preliminary to a "judicial proceeding" within the meaning of Rule 6(e) (App. 73-76) and that the Committee's petition had not established a "particularized need" under the standards articulated and applied by this Court (e.g., App. 75-76). Nonetheless, he concluded that, in view of the Act's purposes, the provisions authorizing the

Committee to "conduct an investigation as extensive as it considers necessary" was sufficient to require that court exercise inherent authority and grant the petition (App. 67-68, 81-84). For the same reason, Judge Gordon concluded that it would be inappropriate for the court to interpose its own judgment by independently examining the grand jury materials to determine whether they were relevant to the allegations in the complaint (App. 84-89). Those same purposes led Judge Gordon to conclude that the Act precluded the court from considering any affirmative defenses Judge Hastings might assert (App. 89-97).

Judge Hastings promptly appealed. Upon receipt of a certificate of necessity, the Chief Justice designated three circuit judges from other circuits to hear and decide the appeal. The special panel stayed the district court's order and

established an expedited schedule for briefing and argument. The parties renewed and further developed their contentions.

The court of appeals affirmed the district court's decision and essentially adopted that court's construction of the Act and its reasoning (App. 1-56). Initially, however, that court ruled that independent examination of the materials by the district court prior to disclosure might have been required if the grand jury's investigation had not focused solely upon the specific conduct alleged in the complaint (App. 46-47). When Judge Hastings reminded the court that there had been no indication or representation that the grand jury's investigation here was so limited[7] and the Justice Department

---

7. Petition for Rehearing at 2-4, In re Petition (11th Cir.), supra; see also, Reply Brief for Appellant the Honorable Alcee L. Hastings at 1-2, 6-8, id.

confirmed that it was not[8], the court amended its opinion to suggest that the burden of proving the scope of the grand jury investigation was upon the accused and that it had not been met by Judge Hastings (App. 106-07).

REASONS FOR GRANTING THE WRIT

There are three basic reasons why this Court should review the decision of the court of appeals. First, the decision below represents a dramatic departure from the decisional jurisprudence that this Court has established to protect the integrity of the grand jury as an institution and to prevent the misuse of its powers. Moreover, the court below approved an exercise of inherent power to order disclosure of the record of a grand jury investigation that was without precedent

---

8. Response of Appellee United States of America to Petition for Rehearing, In re Petition (11th Cir.), supra.

even in the decisions of the inferior federal courts. This Court should review the decision to determine whether the lower court correctly determined that the provisions of the Act and the policies for which it was adopted required so substantial a departure from the well-established principles that the courts have consistently applied in considering requests that grand jury materials be made available for civil use.

Second, the court of appeals construed the Act in a manner that enhanced the constitutional problems inherent in the new statutory assignment of powers to the Judiciary. The Executive had fully exercised the powers of the grand jury to investigate a federal judge's conduct in office and had fully exercised its own discretionary powers to present evidence before the courts to show that that judge

had committed a high crime in office. The indictment alleged conduct that, if proved, could only constitute an impeachable offense, and the evidence that that offense had been committed was developed and made part of the public record. Those records are available to the House of Representatives, and that body is fully competent to conduct any further investigations it deems necessary to determine whether impeachment proceedings are appropriate.

The court of appeals construed the Act to require that a special committee of judges be permitted to examine the records of the grand jury's investigation in an effort to develop a more comprehensive record so that a judicial council and the Judicial Conference could determine whether the impeachable offense alleged had been committed and, if so, could

certify that determination and the record upon which it was based to the House of Representatives for its review. The effect of that decision is to maximize the role of the Judiciary in conducting impeachment investigations and to increase the Executive's incentives to use its powers and those of the grand jury to enhance this judicial role. This Court should grant review to determine whether Congress intended, the Act requires, or the Constitution permits such an expansive interpretation of the Judiciary's newly prescribed administrative powers.

Finally, the interests of the lower courts and their proper functioning can best be served by a prompt and definitive resolution of the questions presented by this court. All concede that the Act represents a substantial political innovation whose implementation will signifi-

cantly affect all judges serving on the inferior federal courts. This Court should grant review to remove the uncertainty created and to provide guidance to the judges of those courts so that the Act may be impartially and uniformly implemented.

The nature of the interests affected by the Act enhances the need for review in this Court. The Justices of this Court are the only Article III judges who are not subject to the Act and, apart from the Chief Justice, the only judges whose powers can be neither enhanced nor diminished by the manner in which the Act is implemented. In the courts below, petitioner conceded that the rule of necessity required that the presiding judges decide the issues presented, notwithstanding the fact that their own interests would be affected by their

decisions. This Court should grant review to assure that those issues are, and are seen to have been, impartially resolved in a manner that properly weighs the interests of federal judges subject to proceedings under the Act as well as the interests of those federal judges whose powers were enhanced by the Act. Each of these reasons is developed briefly below.

1. The Court Should Grant Review to Determine Whether the Lower Court's Unprecedented Departure from Established Principles Developed to Protect the Integrity of the Grand Jury Was Justified.

a. The decision of the court of appeals conflicts with specific principles articulated and applied by this Court in each of the five cases in which this Court has considered requests that grand jury materials be disclosed for use in civil proceedings. United States v. Proctor & Gamble, 356 U.S. 677 (1958) (civil anti-trust defendant not entitled to disclosure

of grand jury transcripts being used by government as civil plaintiff absent a further showing of specific need); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979) (district judge may not grant civil antitrust plaintiff disclosure of specific transcripts that government had previously disclosed to civil defendants without examining the proceedings for which disclosure was requested and the precise grand jury materials requested to determine whether petitioner had established a specific need for particular materials that outweighed the interests embodied in the Rule of Secrecy); Illinois v. Abbott & Associates, Inc., 103 S.Ct. 1356 (1983) [statutory command that Attorney General disclose evidence gathered in criminal antitrust investigations to state attorney generals prosecuting civil antitrust claims insufficient to

override the Rule of Secrecy as codified in Rule 6(e) of the Federal Rules of Criminal Procedure]; United States v. Sells Engineering, Inc., 103 S.Ct. 3133 (1983) [public interest in enforcement of False Claims Act insufficient to support construction that attorneys in Justice Department's Civil Division are "attorneys for government" within the meaning of Rule 6(e)(3)(A)(i) in order to permit disclosure of grand jury materials without demonstration of particularized need]; and United States v. Baggot, 103 U.S. 3164 (1983) [enforcement of revenue laws insufficient to justify construction that administrative proceedings that permit but do not require determination by courts are proceedings preliminary to a "judicial proceeding" within the meaning of Rule 6(e)(3)(C)(i)].

In each of those cases, criminal

proceedings had been terminated without a trial. In each of those cases, all parties conceded the apparent relevancy and usefulness of the grand jury materials sought. In each of those cases, all parties conceded that disclosure of the materials sought would substantially reduce the burdens and costs of investigation and discovery and the possibility that injustice might result if disclosure were not allowed. In each of those cases, the parties seeking disclosure intended to use the material to vindicate major public interests and policies that Congress had explicitly recognized and codified in federal statutes. In each of those cases, this Court found that the party seeking disclosure had not satisfied the particularized need test or met the "judicial proceedings" requirement and thus was not entitled to disclosure.

The court of appeals concluded that the policies it found in the Act required that it reject both the approach taken and the principles applied by this Court in those decisions. Those policies so outweighed the interests embodied in the Rule of Secrecy that the court below found it necessary to reject the principles of statutory construction applied by this Court in Abbott and Sells and to adopt a broad construction of the Committee's statutory mandate in order to find a basis justifying disclosure. The court below also found that the nature of the proceedings authorized by the Act and the interests served required that it approve an exercise of inherent authority to avoid the "judicial proceeding" requirement imposed by Rule 6(e)(3)(C)(i), notwithstanding the approach this Court had taken in Baggott. The court of appeals thought

those same considerations required that the "particularized need" test reiterated in Douglas be reduced to a "reasonable nexus" test and required that the district court abstain from any independent exercise of the judicial power to resolve the parties' contending claims lest it usurp the administrative function the Act assigned to the Committee and the Council. The Court should grant review to determine whether the district courts have an inherent authority as flexible and broad as that affirmed by the court of appeals and, if so, whether it was properly exercised in this case.

b. The decision of the court of appeals also conflicts with the policies this Court's decisions were intended to promote. The grand jury is a unique institution. It straddles two branches of government and serves functions unique to

each. As a judicial institution, the grand jury serves to protect the individual from an overzealous prosecutor (or occasionally to protect society from a prosecutor not zealous enough). As an investigative institution, it significantly enhances the powers of the Executive to investigate possible violations of the criminal laws.

The unique nature of the institution and the potential that its powers might be abused have traditionally guided the courts in exercising the judicial power. The Rule of Secrecy was developed and has been consistently applied by this Court to protect the integrity of the grand jury as an institution and to eliminate incentives that might encourage the Executive to misuse its powers. The respondents here argued in the courts below that these policies were inapplicable when the governmental actors involved were prose-

cuting attorneys and investigating judges. Instead, they argued that the correct policy required that the courts encourage the Justice Department to use the powers of the grand jury to investigate federal judges and thereby to facilitate the work of the judicial councils and their special committees.

The decision below makes this new policy a reality. The court of appeals adopted a holding that encourages prosecuting attorneys to investigate federal judges by making them secure in the knowledge that even if no criminal conduct is revealed the products of the investigation may be transmitted to the investigated judge's circuit council. Moreover, that decision effectively eliminates the one institutional barrier that exists to prevent misuse of the grand jury -- the district court. The object of

a grand jury investigation has traditionally had standing to object to disclosure and to challenge any misuse of the grand jury's records to assure that a case and controversy is presented that will enable the district court to exercise the judicial power to assure that the contending claims are independently evaluated and properly resolved. Where the object of the investigation is a federal judge, the court of appeals concluded the courts must abdicate that role. This Court should grant review to determine whether that decision is correct.

2. The Court Should Grant Review to Determine Whether the Court of Appeals Properly Construed the Act to Avoid or Minimize the Conflict Between the Statutorily and Constitutionally Prescribed Allocation of Powers.

Congress recognized that delegation of power to investigate or sanction federal judges would raise substantial

constitutional questions. See, e.g., H.R. Rep. No. 1313, 96th Cong., 2d Sess. 17-19 (1980); S.Rep. No. 362, 96th Cong., 2d Sess. 4-6, reprinted in 1980 U.S. Code Cong. & Ad. News 4315, 4318-20. Congress also determined that delegation of the House's impeachment prerogatives and the Senate's removal powers would be inappropriate as a matter of constitutional policy. See, e.g., id. Congress reasserted the exclusivity of its jurisdiction to address judicial conduct that might constitute an impeachable offense. See, e.g., id. and Act, § 3(a), 28 U.S.C. § 372(c)(6)(B)(vii), (7)(B), (8), and (14). The construction that the courts below adopted was inconsistent with the construction Congress gave its own powers and created and enhanced the constitutional questions that Congress sought to minimize or avoid.

For example, the complaint repeats the facts and allegations set forth in the indictment on which Judge Hastings was prosecuted, tried, and acquitted. Those are the only allegations with respect to which the grand jury records might reasonably be assumed to contain some relevant evidence. Those facts and allegations charge that Judge Hastings engaged in conduct that is clearly defined as a high crime by statute and that, if proven, could only "constitute . . . grounds for impeachment under Article I of the Constitution" [Act, § 3(a) § 372(c)(7)(B)]. Both the allegations and the evidence that the Executive thought properly supported them are available to Congress and the public.

By claiming it has the power to investigate the allegations further and is entitled to the products of the grand

jury's investigation, the Committee was asking the courts below to construe the Act as an assignment to the Judiciary of investigative powers held by the House incident to its sole power of impeachment and as an invitation to the Judiciary to render advisory opinions to the House on the question whether an impeachable offense had occurred. In effect, the Committee urged and the courts below found that Congress had designated the judicial councils and their ad hoc special committee's investigative agents for the House or had invited them to become congressional lobbyists for or against the impeachment of their judicial colleagues.

The construction the courts below adopted increased the probability that the Act will result in activity that impairs the ability of the courts to perform their own constitutionally assigned functions.

These proceedings alone have caused substantial disruptions to the business of the courts. Judge Hastings has been distracted from and impeded in performing his judicial duties. The judges of the district court determined en banc that they were all disqualified and recused themselves. The Council is composed of the chief judge and every other judge of the court of appeals for the circuit. A special committee of that council became involved in litigation with one district judge of the circuit before a district court within the circuit. Predictably the appeal below resulted in the disqualification of all the judges of the court of appeals and created the need to again call upon judges from outside the circuit.

In that context, the construction of the Act adopted below enhanced the serious constitutional questions that

surround the Act. Congress may not assign its investigative Article I powers to Article III judges [see, e.g., United States v. Ferreira, 54 U.S. (13 How.) 39, esp. 52-53 (1851); Hayburn's Case, 2 U.S. (2 Dal.) 408 (1792); Chicago & Southern Airlines v. Waterman S.S. Corp., 333 U.S. 103 (1948)], especially where the assignment of such powers by one branch to another is likely to unduly disrupt the ability of the receiving branch to exercise its own constitutionally assigned powers [see, e.g., Nixon v. Administrator of General Services, 433 U.S. 425 (1977)]. See also, Kaufman, The Essence of Judicial Independence, 80 Colum. L. Rev. 671 (1980) (for an alternative analysis concluding the Act is unconstitutional); see also Northern Pipeline Construction Co. v. Marathon Pipe Line Company, 458 U.S. 50, 57-60, 59 n.10, (plurality opinion)

(discussing the conditions necessary to judicial independence and noting the need to insulate the individual judge from improper influences from judicial colleagues in order to promote judicial individualism).[9]

This Court should grant review to determine whether the decision below correctly recognized these constitutional concerns and adopted a construction that minimized or avoided them insofar as the Act permitted.[10]

---

9. Counsel does not suggest that these questions are presented for decision by this petition. Counsel raises them here, as he did below, only to illustrate the constitutional problems that were created by the manner in which the courts below construed the Act.

10. If review is granted here, counsel for petitioner will seek to present the issues raised in Hastings v. Judicial Conference, supra, to this Court as soon as feasible so that the Court might have the opportunity to consider both cases together.

3. The Court Should Grant Review to Assure that the Issues Presented are Resolved Uniformly and by the Only Court Whose Members' Interests Will Not Be Directly Affected by the Outcome.

Impartiality and independence are two conditions necessary to the constitutional exercise of the judicial power. That no judge shall preside in any case in which he or she has interests that may be affected by the outcome has long been recognized as a minimum requirement necessary to assure that the public retains its confidence in the impartiality of the courts. This Court has clearly ruled that in a controversy in which Article III judges assert rights incident to the judicial office, the entire federal Judiciary is, as a matter of law, deprived of the impartiality required for the proper exercise of the judicial power, unless the doctrine of necessity applies. United States v. Will, 449 U.S. 200,

210-17 (1980) (action brought by federal judges to determine whether Compensation Clause overrode executive and legislative action denying all governmental officials automatic raises specified in statute); see also DuPlantier v. United States, 606 F.2d 654, 662-63 (5th Cir. 1979), cert. denied, 449 U.S. 1076 (1981) (action by judges challenging constitutionality of financial disclosure requirements as applied to federal judges), and Atkins v. United States, 556 F.2d 1028, 1035-40 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) (action by judges challenging failure of Congress to adjust judicial salaries to account for inflation).

The manner in which the Act is construed and implemented must necessarily affect the interests of every district and circuit judge. For some, it may present a threat; for others, it may create enhanced

powers. But for each, it will have an effect upon the rights he or she holds incident to the judicial office. The proceedings required the courts below to determine whether and under what circumstances a special committee investigating a federal judge may have access to the records of a grand jury. The district judge who decided that question was required to decide how the Act would apply to himself as well as to Judge Hastings. More importantly, the judges of the panel that heard the appeal were required to decide in a judicial capacity what administrative powers they held as members of a circuit judicial council.

Although the doctrine of necessity compelled those courts to hear and determine the case in the first instance, the fact that those decisions were made by judges whose own interests were at stake

and who were specially chosen for the task enhances the need for review by this Court. Judges, like other citizens, are entitled to have their contending claims adjudicated to the extent possible in forums presided over by judges who do not hold otherwise disqualifying interests. This Court provides the only forum in which that is possible.

The fact that the Act affects the interests of federal judges across the country further enhances the need for review by this Court. All judges should share a common concern that the competing interests created by the Act are correctly weighed and fairly resolved. Neither the holders nor the objects of the powers assigned by the Act should be left in doubt as to their scope and proper application in proceedings such as these. This Court should grant review to assure the

balance as fairly, finally, and uniformly struck.

CONCLUSION

The Act is a new political invention. Whether its utility justifies the broad construction adopted by the courts below presents fairly debatable questions that are of great importance to all members of the federal Judiciary. Moreover, the questions also concern a unique institution, the grand jury, and present an important issue that this Court has yet to address -- the extent to which district courts retain inherent authority to order disclosure of grand jury material that is not authorized by Rule 6(e).

The questions presented are important; the decision below squarely presents them. Petitioner respectfully submits that this Court should grant the petition

and issue the writ so that they may be considered and resolved.

Respectfully submitted,

Terence J. Anderson
c/o University of Miami
School of Law
P. O. Box 248087
Coral Gables, Florida 33124
(305) 284-2971

Counsel of record for the
Honorable Alcee L. Hastings,
petitioner.